

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

LYNN OXENBERG and
RONALD LEWIS

Plaintiffs,

v.

ALEX AZAR II, in his official capacity as the
Secretary of the Department of Health and
Human Services.

Defendant.

Case No. 2:20-cv-00738-CMR

**PLAINTIFFS' UNCONSENTED MOTION TO STRIKE/FOR
LEAVE TO FILE SUR-REPLY**

Pursuant to this Court's Order, on May 12, 2020, the Secretary filed a 14-page sur-reply and reply. *See* Dkt. #26. On pages 11-12 thereof, the Secretary presented a new argument about the "record" in this case. Previously, the Secretary asserted that the decisions on which collateral estoppel is based were not in the record. *See* Dkt. #17 at 11. In their reply/opposition, Plaintiffs demonstrated that the decisions are in the record. *See* Dkt. #23 at 4.

The May 12 filing now argues that, even though the decision *are* in the record, the Court should not review them. This is a new argument which Plaintiffs did not have a chance to respond to. In the Third Circuit, "An issue is waived unless a party raises it in its opening brief." *See Laborers' Int'l Union v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3rd Cir. 1994). Thus, Plaintiffs ask that the argument appearing on pages 11-12 of the May 12 filing be stricken/deemed waived.

In the alternative, Plaintiffs request leave to file a 3 page sur-reply (attached) that addresses this issue.

Dated: May 18, 2020

Respectfully submitted,

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